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No. 94-466

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY,
Petitioner,

v.

NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTY APPRAISAL DISTRICT,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As shown in the petition, this case presents a sharply-defined issue of national importance. There can be no serious question that the decision of the Texas Supreme Court conflicts with decisions of this Court under the Import-Export Clause and the Commerce Clause as well as with the decision of the Fifth Circuit in *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir.), *cert. denied*, 498 U.S. 897 (1990).

1. Respondents do not dispute the enormous economic significance of this case. As shown in the petition (at 7-8, 18-21), and in the brief of Amicus Curiae American Petroleum Institute filed in support of the petition (at 2-3), billions of dollars of crude oil are imported into this country each year through a limited number of ports in Texas. Respondents concede — as they must — that this oil, like many other imported goods, is

often temporarily delayed at its port of entry due to transportation bottlenecks.[1] (Opp. at 4.) In addition, Respondents do not dispute that ports of entry such as Corpus Christi assess property taxes upon goods imported through them; that ports of entry can discriminate against imported goods by imposing facially neutral property taxes; or that there are few if any, political checks upon such discrimination. Finally, Respondents do not contest what the briefs of Amici Curiae American Petroleum Institute, General Motors Corporation, and Institute for Property Taxation clearly demonstrate: that state and local governments throughout the country will be encouraged to impose new taxes upon interstate and foreign commerce now that the Texas Supreme Court has approved a form of taxation hitherto assumed invalid under this Court's decisions.

2. Respondents oppose certiorari on the ground that, in their view, the decision below was correct. They primarily argue that the tax in question is consistent with the purposes of the Import-Export Clause and the Commerce Clause because no transit fees were passed along to citizens of other states. (Opp. at 11-12.) This argument is premised upon the erroneous and unsupported assumption that the oil imported into Texas was "consumed within the State." (Opp. at 12.) There is, however, no evidence in the record that the oil in question was consumed within the state. The stipulation states only that the oil was refined in Texas (App. 58a-59a), and the Texas Supreme Court's decision was premised on the fact that "[n]one of the crude oil in question was pumped or sold outside the State of Texas *in its present form.*" (App. 20a (emphasis added).) Thus, the decision below held that ports of entry may impose property taxes on raw materials in transit through them even though those materials may later be processed into finished goods and sold to consumers outside their state of entry.

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[1] Respondents also argue that domestic crude oil is subject to similar bottlenecks (Opp. at 4.), thereby implicitly agreeing with Amicus Curiae General Motors Corporation that this case presents an issue of importance to interstate as well as foreign commerce.

More fundamentally, the Import-Export Clause does not merely prohibit taxes that discriminate against out-of-state consumers; it bars "*all* Duties and Imposts" levied by states on imported goods. U.S. Const., art. I, § 10, cl.2 (emphasis added); *see Itel Containers Int'l Corp. v. Huddleston*, 113 S.Ct. 1095, 1108 (1993) (Scalia, J., concurring in part and concurring in the judgment) (noting that the prohibition on imposts and duties has a "firm basis in a constitutional text that cannot be avoided by showing that the tax on imports and exports is nondiscriminatory") (footnote omitted). As shown in the petition (at 9-11), the term "Duties" easily encompasses the tax at issue here. Respondents do not deny this, nor do they deny that a property tax assessed by a port of entry upon goods in transit through the port "is, on a substantive level, indistinguishable from an import duty." (Pet. at 10.)

3. As shown in the petition (at 10-12), the decision below conflicts with *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). Respondents do not deny that *Michelin* prohibits taxes upon imported goods in transit, nor do they dispute that *Michelin* adopted Chief Justice Taney's position that the Clause prohibits the assessment of property taxes upon goods in transit. Instead, Respondents contend that in *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130 (1986), this Court held that property taxes could be imposed upon goods "technically in transit" so long as those goods are in their state of destination. (Opp. at 13-15.) Respondents' reliance upon *Reynolds*, a case the Texas Supreme Court cited only in passing (*see* App. 2a, 5a n.1), is misplaced. The tobacco at issue in *Reynolds* was deposited in warehouses to age for up to two years, *see* 479 U.S. at 133-34, leading this Court to conclude that there was "nothing transitory" about the tobacco. *See id.* at 155. The goods here, by contrast, were not stored for any appreciable time, and it was expressly stipulated that they were in transit when they were taxed. (App. 57a-58a).

4. Respondents appear to concede that the decision below conflicts with pre-*Michelin* decisions of this Court under the Import-Export Clause. They assert that those cases are nonetheless "easily distinguished on their facts or their era."

(Opp. at 12.) Respondents do not, however, offer any of the supposedly easily made factual distinctions. Nor do they suggest that any of the cases cited in the petition have been overruled. *Cf. Itel Containers*, 113 S.Ct. at 1106 (assuming that the "prohibition on the direct taxation of imports and exports 'in transit' . . . has not been altered by the approach we adopted in *Michelin*"); *Michelin*, 423 U.S. at 279 (holding that only "insofar as *Low v. Austin*, 13 Wall. 29 (1872), is to the contrary, that decision is overruled").

5. As shown in the petition (at 13, 16-17), the decision below conflicts with this Court's decision in *Associated Industries v. Lohman*, 114 S.Ct. 1815 (1994), because it analyzes Respondents' regulation of commerce on the state rather than the county level and thereby authorizes political subdivisions of a state to regulate commerce in a manner in which the state is forbidden. This point was either lost on Respondents or they have simply chosen to ignore it. In any event, the resulting conflict merits resolution by this Court.

6. Respondents do not dispute that the decision below conflicts with the decision of the Fifth Circuit in *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, except to suggest that *Louisiana Land* may be distinguished because it involves exports rather than imports. (Opp. at 17.) This is a distinction without a difference. The Import-Export Clause does not distinguish between imports and exports: it bars "all Duties and Imposts, laid by any State on Imports or Export." U.S. Const. art. I, § 10, cl. 2. As the petition demonstrates (at 16), the lower courts in Texas have understood the decision below to apply to exports as well as imports.

7. As shown in the petition (at 16-17), the decision below also conflicts with a long line of cases under the Commerce Clause prohibiting the imposition of property taxes upon goods in transit. Although Respondents argue that the tax imposed in this case is consistent with the analytical framework adopted in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), they do not suggest that *Complete Auto* overruled or in any way rejected the cases cited by petitioner. Respondents do not even

attempt to defend the suggestion below (*see* App. 10a n.7), which the petition demonstrated to be unfounded (Pet. at 17), that this Court questioned the continuing validity of the in-transit rule in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988). Nor do Respondents deny that leading commentators still consider the in-transit rule to be the law. (*See* Pet. at 17.)

8. Resolution of the conflicts over the issue raised by this case — whether ports of entry may assess property taxes on goods in transit through them — is important to the planning and efficient operation of the import sector of the economy and to the operations of the state and local governments encompassing ports of entry and other transportation bottlenecks. The decision below presents the perfect vehicle in which to resolve this issue.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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